(3)

Supreme Court, U.S.
FILED
FEB 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1094

In the Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH, PETITIONER–

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, AND EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ATTORNEY GENERAL IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

JAMES M. SPEARS
Deputy Assistant Attorney General

DOUGLAS LETTER
DWIGHT G. RABUSE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a federal court may enjoin or declare unlawful a criminal investigation where the only injury alleged is that the investigation is being conducted by a person without authority to do so.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Cobbledick v. *United States*, 309 U.S. 323 (1940)	9
Deaver v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987)	5
Douglas v. *City of Jeannette*, 319 U.S. 157 (1943)	9
Jett v. *Castaneda*, 578 F.2d 842 (9th Cir. 1978)	9
Juluke v. *Hodel*, 811 F.2d 1553 (D.C. Cir. 1987)	8
Kugler v. *Helfant*, 421 U.S. 117 (1975)	9
Olagues v. *Russoniello*, 797 F.2d 1511 (9th Cir. 1986), vacated, No. 86-1217 (Oct. 5, 1987)	8
Pennzoil Co. v. *Texaco, Inc.*, No. 85-1798 (Apr. 6, 1987)	9
Reporters Committee for Freedom of the Press v. *American Telephone & Telegraph*, 593 F.2d 1030 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979)	9
Smith v. *Meese*, 821 F.2d 1484 (11th Cir. 1987)	8
Steffel v. *Thompson*, 415 U.S. 452 (1974)	9
Younger v. *Harris*, 401 U.S. 37 (1971)	9

Constitution, statutes, regulations and rule:

U.S. Const.:	
Amend. I	8
Art. II	3
§ 2	3
Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824	1, 3
28 U.S.C. 49	2
28 U.S.C. 592(a)(1)	2
28 U.S.C. 592(c)(1)	2

Statutes, regulations and rule—Continued: Page

28 U.S.C. 592(d)(1) 2
28 U.S.C. 593(b) 2
28 U.S.C. 594(a) 2

28 C.F.R.:
Pt. 600 3
Pt. 601 3

Fed. R. Crim. P. 12(b)(1) 5

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1094

OLIVER L. NORTH, PETITIONER

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, AND EDWIN MEESE, III, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ATTORNEY GENERAL IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the court of appeals (Pet. App. 1a-2a, 3a-4a) are not yet reported. The opinion of the district court (Pet. App. 5a-24a) is reported at 656 F. Supp. 414.

JURISDICTION

The judgments of the court of appeals were entered on October 1, 1987. The petition for a writ of certiorari was filed on December 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, provides for the appointment of an independent counsel to investigate and prosecute certain

members of the Executive Branch charged with criminal conduct. Whenever the Attorney General receives information sufficient to constitute grounds to investigate allegations that a person covered by the Act has committed a violation of any federal criminal law (other than a petty offense), the Act requires that he conduct an investigation of the matter for a period not to exceed 90 days. 28 U.S.C. 592(a)(1). If the Attorney General finds reasonable grounds to believe that the matter warrants further investigation or prosecution, the Act requires that he apply to a special division of the United States Court of Appeals for the District of Columbia Circuit for the appointment of an Independent Counsel. 28 U.S.C. 49, 592(c)(1) and (d)(1). Upon receipt of such an application, the special division of the court of appeals must appoint an appropriate Independent Counsel and define a prosecutorial mandate. 28 U.S.C. 593(b). An Independent Counsel so appointed enjoys the authority to exercise virtually all investigative and prosecutorial functions and powers of the Department of Justice and the Attorney General, including the authority to conduct proceedings before grand juries, to apply for warrants, subpoenas, and other court orders, and to frame indictments, file informations, and handle all aspects of a case in the name of the United States. 28 U.S.C. 594(a).

2. On December 4, 1986, respondent Attorney General Meese applied for the appointment of an Independent Counsel to investigate whether petitioner North and others may have violated any federal criminal laws with regard to the transfer of arms to Iran or the disposal of the resulting proceeds (Pet. App. 12a). On December 19, 1986, respondent Lawrence E. Walsh was appointed by the special division of court as Independent Counsel to investigate this so-called "Iran/Contra Affair" (*ibid.*). Respondent Walsh promptly began his investigation,

empaneled a grand jury, served numerous subpoenas, and otherwise explored various aspects of petitioner's participation in the Iran/Contra Affair (*ibid.*).

On February 24, 1987, petitioner filed suit against respondent Walsh and respondent Attorney General Meese in the United States District Court for the District of Columbia (Pet. App. 12a). Petitioner challenged the authority of respondent Walsh to conduct his investigation and sought a declaratory judgment that the independent counsel provisions of the Ethics in Government Act are unconstitutional (*id.* at 12a, 36a-38a).[1] On March 2, 1987, respondent Walsh moved to dismiss the suit, arguing that petitioner was engaged in an impermissible collateral attack on an ongoing criminal investigation, that petitioner's claims were not ripe, and that the disputed provisions of the Act are constitutional (*id.* at 12a-13a). On March 5, 1987, respondent Attorney General Meese similarly filed a motion to dismiss, joining in the procedural arguments of respondent Walsh and additionally arguing that petitioner lacked standing to challenge the Act's constitutionality (*id.* at 13a).

To remove any doubt concerning respondent Walsh's authority to conduct the investigation, the Attorney General, on that same day, promulgated new regulations establishing an "Office of Independent Counsel: Iran/Contra" within the Department of Justice (28 C.F.R. Pts. 600, 601) and appointed respondent Walsh to

---

[1] Specifically, petitioner alleged that respondent Walsh, while performing investigative and prosecutorial functions reserved to the Executive under Article II of the Constitution, and thus purporting to act as an Officer of the United States within the meaning of Art. II, § 2, had not been appointed by the President or by a Department Head, as the Constitution requires. Petitioner alleged that the independent counsel provisions thus violated separation of powers principles. See Pet. App. 36a-38a.

head the Office (Pet. App. 13a). Under that appointment, respondent Walsh was empowered to investigate the same matters and activities that he had undertaken to investigate pursuant to his appointment under the Act (*ibid.*). Petitioner responded, on March 6, 1987, by filing a second complaint in the district court, alleging that the new regulations and appointment were legally infirm (*id.* at 42a). On March 9, 1987, respondent Walsh moved to dismiss the second complaint as well (*id.* at 13a-14a).

With the consent of all parties, the district court, on March 9, 1987, heard argument on the procedural issues relevant to both complaints (Pet. App. 13a-14a). Then, on March 12, 1987, the district court dismissed both complaints (*id.* at 5a-24a). Without resolving the questions raised concerning petitioner's standing or the constitutionally of the Act, the court determined that petitioner had "not alleged a sufficient hardship to meet the ripeness standard and to [allow] anticipatory judicial involvement in the ongoing criminal investigation" (*id.* at 14a). It noted that "[c]ourts have almost never found that an ongoing criminal investigation imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment" (*id.* at 17a). And the court found that petitioner's allegations were not sufficient to bring this case within the "extraordinary circumstances" exception to the general rule, because petitioner's "only claim of injury is that he is the subject of an investigation which is headed by a public official who is, he alleges, without that authority" (*id.* at 21a), and because "[t]his 'injury' does not rise to the level of concrete hardship warranting judicial review at this time" (*ibid.*). Rather, given the nature of the injury alleged, the court determined that "Colonel North, like any other potential criminal defendant, can raise his objections by appropriate motion, *if* and *when* an indictment is entered" (*id.* at 23a). On that premise, the court

ruled that petitioner's "challenge to the constitutionality of the independent counsel machinery is not ripe for adjudication" (*id.* at 24a).

3. Petitioner promptly filed a notice of appeal. Respondent Walsh answered with a motion for summary affirmance based principally on the court of appeals' recent decision in *Deaver* v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987), cert. denied, No. 86-2026 (Oct. 5, 1987) (Pet. App. 70a-85a).[2] While that appeal was pending, however, petitioner refused to comply with a subpoena issued by the grand jury that respondent Walsh had empaneled to investigate the Iran/Contra matter and was accordingly held in contempt by the district court. On appeal of that contempt order, the court of appeals found that petitioner's challenge to the validity of respondent Walsh's status as prosecutor was ripe for review, but that a remand was necessary so that the district court could initially decide whether the parallel appointment by the Attorney General mooted the constitutional question that petitioner had raised. *In re Sealed Case*, 827 F.2d 776 (1987) (*North I*).

On remand, the district court ruled that the Attorney General's parallel appointment of respondent Walsh was valid and that resolution of petitioner's constitutional challenge was unnecessary. In August 1987, the court of appeals affirmed the district court's judgment in all

---

[2] The *Deaver* case also involved the dismissal on procedural grounds of a challenge to the constitutionality of the appointment of an Independent Counsel. In *Deaver*, the court of appeals held that an assertion that the imminent return of an indictment threatened irreparable injury was not a sufficient basis for allowing a plaintiff to maintain an ancillary civil challenge to a criminal investigation. Rather, the court determined that Federal Rule of Criminal Procedure 12(b)(1), which permits a criminal defendant to raise arguments concerning the alleged constitutional infirmities of the proceeding against him as a defense following indictment, provides an adequate remedy in such cases.

respects. *In re Sealed Case* (*North II*), 829 F.2d 50 (1987). On January 19, 1988, this Court denied a petition for a writ of certiorari from that judgment (No. 87-869).

4. Prior to this Court's denial of the petition from the judgment in *In re Sealed Case* (*North II*), the court of appeals summarily affirmed the district court's dismissal of petitioner's complaints in this case (Pet. App. 1a-4a). The court of appeals found that "Colonel North, like the appellant in *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987), has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action" (Pet. App. 2a). The court explained that "[i]t is clear, after *Deaver*, that potential criminal defendants 'cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure' " (*ibid.* (citation omitted)).[3]

ARGUMENT

1. Petitioner asks the Court to decide (Pet. i) "[w]hether the target of a federal criminal investigation being conducted in violation of the Constitution and laws of the United States is absolutely barred from seeking declaratory or injunctive relief from that investigation in federal court." But, in *In re Sealed Case* (*North II*), the court held "that Walsh and his associate counsel derive the necessary legal authority from the Attorney General's regulation of March 5, 1989" (829 F.2d at 62) and, furthermore, that petitioner cannot establish any cognizable harm to support a ripe constitutional challenge (because

[3] Following the decision in this case, the court of appeals in another proceeding held the Independent Counsel provisions of the Ethics in Government Act to be unconstitutional. *In re Sealed Case (Olson)*, No. 87-5261 (D.C. Cir. Jan. 22, 1988), appeal docketed, No. 87-1279 (Feb. 1, 1988).

respondent Walsh's parallel appointment vests him with "identical authority" to that provided by the Act) (*id.* at 61-62). Thus, even if, under some circumstances, a federal court could grant equitable relief to the target of a federal criminal investigation being conducted in violation of the Constitution and the laws of the United States, it would be improper to grant such relief to petitioner in this case. The court of appeals has already decided, in a final judgment that this Court has declined to review, that respondent Walsh is authorized by the Attorney General's appointment to conduct the Iran/Contra investigation. The decision in that case has disposed of the premise on which petitioner's request for equitable relief was based and thus deprives petitioner's legal issue of any practical effect.

2. Even disregarding the effect of the ruling upholding respondent Walsh's authority to conduct the Iran/Contra investigation, it is clear that review by this Court is not warranted. The petition mischaracterizes the judgment of the court below and thus suggests a conflict among the circuits that does not actually exist.

Contrary to petitioner's repeated suggestion (Pet. i, 6, 8, 9, 10-11, 14-16), the court of appeals did not hold that the target of a federal criminal investigation is absolutely barred from seeking declaratory or injunctive relief from that investigation in federal court. No such question was presented for review by the court below. The only question presented for the court's review was whether the target of a pending criminal investigation may obtain such relief where the only injury he claims is that he is the subject of an investigation headed by a public official who is allegedly without authority to conduct the investigation. The court of appeals held (Pet. App. 2a, 4a) that, where only that kind of injury is alleged, the target of the criminal investigation may not obtain declaratory or injunctive relief.

That holding is a far cry from the absolute rule against judicial interference with a pending criminal investigation that petitioner alleges the court adopted in this case.

The decision below therefore does not, as petitioner suggests (Pet. 6-11), conflict with the decision in either *Olagues* v. *Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (en banc), vacated and remanded with instructions that the case be dismissed as moot, No. 86-1217 (Oct. 5, 1987), or *Smith* v. *Meese*, 821 F.2d 1484 (11th Cir. 1987). The judgment of the Ninth Circuit in *Olagues* has been vacated as moot and for that reason clearly cannot be relied upon to support a claim of conflict with the judgment here. Moreover, neither *Olagues* nor *Smith* concerned the question whether a court may declare unlawful or enjoin a pending criminal investigation where the only constitutional claim in issue relates to the authority of the prosecutor to conduct the investigation in the first instance. Rather, the courts in *Olagues* and *Smith* addressed questions concerning whether a federal court may entertain prayers for declaratory and injunctive relief where the constitutional claim raised relates to the "chilling effect" an investigation has on First Amendment or voting rights. Both courts held that, where such injuries are alleged, a federal court has equitable authority to entertain a pre-indictment challenge to the conduct of the investigation. See also *Juluke* v. *Hodel*, 811 F.2d 1553 (D.C. Cir. 1987). Whether or not those holdings are correct, they address claims that, as both the district court here and the panel in *Deaver* recognized (Pet. App. 22a n.13, 76a, 78a-79a & n.8, 84a-85a), are quite different from the claim raised in this case. Where, as here, an individual alleges only that he is subject to an investigation that is headed by a public official without authority to conduct it, the individual's ability to raise the invalidity of the investigation as a defense to any ensuing indictment is an adequate remedy.

Equitable relief is therefore unwarranted. See *Younger* v. *Harris*, 401 U.S. 37, 46 (1971); *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163 (1943); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940).

Petitioner similarly errs in suggesting (Pet. 11-16) that the decision below ignores or conflicts with this Court's decisions in *Younger* v. *Harris, supra*, or *Steffel* v. *Thompson*, 415 U.S. 452 (1974). While, as petitioner suggests, the decision in *Younger* was "reinforced" by federalism principles, the "first ground for the *Younger* decision was 'the basic doctrine of equity jurisprudence that courts of equity * * * should not act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law.' " *Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798 (Apr. 6, 1987), slip op. 7 (citation omitted). Thus, contrary to petitioner's suggestion, the lower federal courts, including the District of Columbia Circuit, have uniformly held that, to the extent they are subject to legal challenge at all, federal criminal investigative activities may be enjoined or declared unlawful only in the most "extraordinary circumstances." See, *e.g.*, *Reporters Committee for Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979); *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978). Similarly, while *Steffel* did hold, as petitioner suggests, that there are some cases in which declaratory but not injunctive relief may issue (415 U.S. at 466-473), the "extraordinary circumstances" standard applies to prayers for declaratory as well as for injunctive relief. See *Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975). The court of appeals simply affirmed the district court's conclusion (Pet. App. 17a-23a) that *Younger*'s "extraordinary circumstances" standard was not satisfied by petitioner's allegations. The judgment of the court of appeals is therefore in no sense inconsistent with *Younger* or *Steffel*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General
DOUGLAS LETTER
DWIGHT G. RABUSE
Attorneys

FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60269